

SERVICE DATE – JUNE 6, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35790

CAPITOL CORRIDOR JOINT POWERS AUTHORITY AND NATIONAL RAILROAD
PASSENGER CORPORATION—PETITION FOR DECLARATORY ORDER—PRIIA
SECTION 209 COST ALLOCATION METHODOLOGY IMPLEMENTATION

MOTION FOR PROTECTIVE ORDER

Decided: June 5, 2014

By unopposed motion filed April 29, 2014, National Railroad Passenger Corporation (Amtrak) seeks a protective order under 49 C.F.R. § 1104.14 to protect the parties' confidential and proprietary information or documents that will be produced during discovery.¹ Good cause exists to grant the motion and issue a protective order with modifications, as discussed below.

There are two aspects of the protective order that raise concerns. First, the submitted protective order appears to define "Confidential" as all information exchanged by the parties in discovery. Second, the submitted protective order does not provide for the filing of public versions of materials submitted to the Board under seal. One possible effect of these two aspects of the order could be that all future filings in this proceeding would be submitted under seal with no public versions available. Such an outcome is inconsistent with Board policy. See, e.g., Rapid City, Pierre & E. R.R.—Acq. & Operation Exemption—Dakota, Minn. & E. R.R., FD 35799 et al., slip op. at 3 (STB served Feb. 13, 2014) (modifying a proposed protective order to require the filing of public versions of confidential filings).

As such, the submitted protective order will be modified to be consistent with protective orders previously adopted by the Board, including: (1) modifying the definition of "Confidential Information"; (2) adding a definition for "Confidential Documents"; and (3) adding a provision requiring the simultaneous filing of a public version of any filing submitted under seal. The motion for protective order will be granted, and the protective order and undertaking in the Appendix to this decision will be adopted.

¹ A proposed protective order and undertaking were included with the motion.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for protective order is granted, and the protective order and undertaking in the Appendix to this decision are adopted.

2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Order:

(a) “Confidential Information” means confidential financial and cost information, confidential personnel information, confidential agreements, and other confidential or proprietary information.

(b) “Confidential Documents” means all documents and other tangible materials containing or reflecting Confidential Information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” in accordance with paragraph 2 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (Board) concerning Docket No. FD 35790 and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.

3. All Confidential Information provided by any party to any other party shall be used only for the purposes of this matter and for no other purpose whatsoever. Confidential Information shall not be disclosed to any other person except as provided in this Order.

4. A party receiving Confidential Information shall not disclose the Confidential Information or its contents, or discuss it or its contents, except for the purposes of this matter, and only to the following persons:

a) an employee, counsel, expert witness, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent to whom it is necessary that the material be shown for purposes of this matter;

b) the Board and its employees; and

c) such other person, and on such other terms and conditions as the Parties agree to in writing or as the Board, upon application, may order.

5. Each person referred to in paragraph 4(a), prior to viewing or discussing Confidential Information shall agree to be bound by the terms of this Order and shall consent to execute an undertaking in the form annexed hereto as Exhibit A. The attorneys for the party to whom documentary production or other discovery is made in this action shall maintain a file of such written agreements.

6. No party may include Confidential Information in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

7. No party may include Confidential Information in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

8. No party may present or otherwise use any Confidential Information at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Confidential Information to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Confidential Information, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Confidential Information in accordance with this Protective Order.

9. A public version of any confidential submission must be simultaneously filed with the Board.

10. Whenever a party takes a deposition in which Confidential Information may be or is disclosed:

a) The deposition shall be subject to the provisions of this Order on the designation of the party whose witness is deposed. Such designation shall be made on the record whenever possible. A party may designate portions of a deposition transcript as containing Confidential Information after transcription if the party promptly notifies all other Parties of the designation in writing and the transcript or its contents have not already been disseminated beyond the class of persons designated in paragraph 4 of this Order.

b) All portions of deposition transcripts or exhibits that consist or, refer to, or otherwise disclose Confidential Information shall be filed under seal and be otherwise handled as provided in Paragraph 6 of this Order.

11. Upon termination of this matter, each party will remain bound to the terms of this Order.

12. Within ten (10) business days of this matter having been finally resolved, each party shall return all Confidential Information to counsel for the opposing party, or provide an executed declaration that all Confidential Information has been destroyed (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings).

13. A party may disclose Confidential Information pursuant to judicial action or Government regulations, provided the disclosing party notifies the other party prior to such disclosure and cooperates with the other in the event the other elects to legally contest and avoid such disclosure. A party's production or disclosure of Confidential Information, pursuant to this Order, shall not be deemed as a waiver of confidentiality or other privileges.

14. No act or omission by any party or anything stated in this Order by any other party shall be interpreted as a waiver of any objection, claim, or defense.

15. Notwithstanding the terms of this Order, each party shall have the right to object to any discovery or to apply to the Board at any time for an order granting additional protective or other relief with respect to any confidential, proprietary or privileged material.

16. This Order does not require any party to produce any document or information that is not otherwise subject to discovery.

17. Neither the terms of this Order, nor any action taken in compliance with it shall, (a) operate as an admission by any of the parties that any document or information is, or is not, confidential or proprietary; (b) prejudice the right of any party to seek a Board determination of whether or not any document or information should be subject to the terms of this Order or; (c) operate as an admission by any party that any document or information is, or is not, admissible into evidence at the trial of this action. Any party may request that the Board modify or otherwise grant relief from any provision of this Order.

Exhibit A
UNDERTAKING—CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order dated June 6, 2014, governing the production and use of Confidential Information in Docket No. FD 35790, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 35790, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 35790 and/or with any related proceedings. I further agree not to disclose any Confidential Information obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and/or who have executed Undertakings in the form hereof, and that within 10 business days of being notified that this proceeding has been finally resolved (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents, materials, and/or information containing or reflecting materials designated or stamped as “CONFIDENTIAL” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing Confidential Information shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____
Dated: _____